



including the AUMF and Sections 821 and 836 of Title 10, United States Code.<sup>3</sup>

e. In his Order, the President determined that “[t]o protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order . . . to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.”<sup>4</sup>

f. The President ordered, “Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed . . . .”<sup>5</sup> He directed the Secretary of Defense to “issue such orders and regulations . . . as may be necessary to carry out” this Order.<sup>6</sup>

g. Pursuant to this directive by the President, the Secretary of Defense on March 21, 2001, issued Department of Defense Military Commission Order (MCO) No. 1 establishing jurisdiction over persons (those subject to the President’s Military Order and alleged to have committed an offense in a charge that has been referred to the Commission by the Appointing Authority)<sup>7</sup> and over offenses (violations of the laws of war and all other offenses triable by military commission).<sup>8</sup> The Secretary directed the Department of Defense General Counsel to “issue such instructions consistent with the President’s Military Order and this Order as the General Counsel deems necessary to facilitate the conduct of proceedings by such Commissions . . . .”<sup>9</sup>

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<sup>3</sup> Sections 821 and 836 are, respectively, Articles 21 and 36 of the Uniform Code of Military Justice (“UCMJ”). These sections provide, in relevant part:

**Art. 21. Jurisdiction of courts-martial not exclusive**

The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.

**Art. 36. President may prescribe rules**

- (a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commission and other military tribunals . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.
- (b) All rules and regulations made under this article shall be uniform insofar as practicable.

<sup>4</sup> 66 Fed. Reg. 222 (November 16, 2001), Section 1(e).

<sup>5</sup> *I.d.* at Section 2(a).

<sup>6</sup> *I.d.* at Section 2(b).

<sup>7</sup> Military Commission Order (MCO) No. 1, para. 3(A).

<sup>8</sup> *I.d.* at para. 3(B).

<sup>9</sup> *I.d.* at para. 8(A).

h. The General Counsel of the Department of Defense issued a series of Military Commission Instructions (MCIs) for trials by Military Commission. Included in these instructions is MCI No. 2 which addresses “Crimes and Elements for Trial by Military Commission,” in which one of the enumerated crimes is “Terrorism.” The elements of the crime of “Terrorism” are identified as follows:

- (1) The accused killed or inflicted bodily harm on one or more persons or destroyed property;
- (2) The accused:
  - (a) intended to kill or inflict bodily harm on one or more persons;
  - or
  - (b) intentionally engaged in an act that is inherently dangerous to another and evinces a wanton disregard of human life;
- (3) The killing, harm or destruction was intended to intimidate or coerce a civilian population, or to influence the policy of a government by intimidation or coercion; and
- (4) The killing or destruction took place in the context of and was associated with armed conflicts

Military Commission Instruction No. 2, para. 6B.2a.

i. On June 9, 2004, the Appointing Authority approved charges against the Accused including Conspiracy to Commit the Offense of Terrorism. Terrorism is an enumerated charge in MCI No. 2,<sup>10</sup> and Conspiracy is an enumerated form of liability.<sup>11</sup> On June 25, 2004, the Appointing Authority referred the charges to the Military Commission for trial.

#### 4. Legal Authority Cited.

- a. Military Commission Order (MCO) No. 1.
- b. Military Commission Instruction (MCI) No. 2.
- c. President’s Military Order, 66 Fed. Reg. 222 (November 16, 2001).
- d. Articles 21 and 36 of the Uniform Code of Military Justice, 10 U.S.C. §§ 821, 836.
- e. Report of the Commission on Responsibilities, UN War Crimes Commission, *History of the United Nations War Crimes Commission and the development of the laws of war* (London: HMSO, 1948).

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<sup>10</sup> MCI No. 2, para. 6(B)(3) and (4).

<sup>11</sup> *Id.* at para. 6(C)(6) and (7).

- f. Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London, 1945 (Washington D.C.: US Government Printing Office, 1949).
- g. *Kriangsak Kittichaisaree, International Criminal Law (2001)*.
- h. *Trial of Shigeki Motomura and others*, 13 Law R. Trials War Crim. 138.
- i. United States Field Manual No. 27-10: The Law of Land Warfare (Washington D.C.: Department of the Army) (1956).
- j. United Kingdom Manual of Military Law, Part III: The Law of War on Land (London: The War Office, HMSO) (1958).
- k. International Convention for the Suppression of the Financing of Terrorism, Jan. 10, 2000.
- l. <http://untreaty.un.org/English/Terrorism.asp>
- m. *Madsen v. Kinsella*, 343 U.S. 341, 346-7 (1952)
- n. *Ex Parte Quirin*, 317, U.S. 1 (1942).
- p. *Hamdi, et.al. v. Rumsfeld, Secretary of Defense, et. al.*, (124 S.Ct. 2633, 2639 (2004)).
- q. 18 U.S.C. §2332. Homicide.
- r. 18 U.S.C. §2332a. Use of certain weapons of mass destruction.
- s. 18 U.S.C. §2332b. Acts of terrorism transcending national boundaries.
- t. 18 U.S.C. §2332f. Bombing of public use, government facilities, public transportation systems and infrastructures.
- u. 18 U.S.C. §2339. Harboring or concealing terrorists.
- v. 18 U.S.C. §2339A. Providing material support to terrorists.
- w. 18 U.S.C. §2339B. Providing material support or resources to designated foreign terrorist organizations.
- x. 18 U.S.C. §2339C Prohibitions against the financing of terrorism.

5. Discussion. The Defense moves to strike “terrorism” from Charge 1 because terrorism is not an offense under the law of war and Congress has not enacted legislation making terrorism an offense triable by military commission. This argument is without merit.

a. Terrorism is an Offense under International Law

Terrorism is a violation of international law, both as a violation of the law of war and conventional law addressing specific aspects of terrorism. Terrorism is also a violation of U.S. law.

Acts of terrorism as a violation of laws of armed conflict were first codified in 1945 in **The Australia’s War Crimes Act of 1945**. That was followed by **Article 33 of the 1949 Geneva Convention IV, Article 51(2) of the Additional Protocol I and Article 4(d) and 13 sub-paragraph 2 of Additional Protocol II to the Geneva Conventions of 1949**. The concept of “terrorism” as a chargeable war crime was contemplated, as early as 1919 by the Commission on Responsibilities, a body created by the Preliminary Peace conference of Paris to inquire into the breaches of the laws and

customs of war committed by Germany and its allies during World War I.<sup>12</sup> The Australia's War Crimes Act of 1945, which criminalized "systematic terrorism," credited the work of the Commission on Responsibilities.<sup>13</sup>

In 1945, the concept of terrorism was again discussed at the London Conference, which was assembled to negotiate the formation of the International Military Tribunal (IMT). In fact, the British delegation went so far as to propose specific language criminalizing terror against civilians in the context of armed conflict.<sup>14</sup> Interestingly, the proposed language does not significantly depart from the definition contained in MCI No. 2.

While terrorism as a crime was not specifically included in Article 6 of the Nuremberg Charter of 1945, the elements of terrorism can be seen in the offenses that were included in the Charter designed to prosecute and punish those who would commit offenses against civilians, that is, war crimes and crimes against humanity. Among the war crimes that incorporated elements of terrorism were: murder of the civilian population, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity. The crimes against humanity that address elements of terrorism included: murder and other inhumane acts committed against any civilian population, before or during war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal. *Kriangsak Kittichaisaree, International Criminal Law* p. 87 (2001).

The first conviction for a "terror charge" by a tribunal was delivered in July 1947 in Makassar in the Netherlands East-Indies (N.E.I.), now known as Indonesia. The offenses alleged in *Motomura*<sup>15</sup> were charged in the indictment as

systematic terrorism against persons by the Japanese of punishable acts ... this systematic terrorism taking the form of repeated, regular and lengthy torture and/or ill-treatment, the seizing of men and women on the grounds of wild rumors, repeatedly striking them ... the aforesaid acts having led or at least contributed to the death, severe physical and mental suffering of many.<sup>16</sup>

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<sup>12</sup> See On the Commission on Responsibilities, see UN War Crimes Commission, *History of the United Nations War Crimes Commission and the development of the laws of war* (London: HMSO, 1948), CH.III and id at 15.

<sup>13</sup> *Id.*

<sup>14</sup> The tribunal shall have the power to try, convict and sentence any person who has, in any capacity whatever directed or participated in the planning, furtherance, or conduct of any or all of the following acts, designs, or attempts namely:[...]

2. Systematic atrocities against or systematic terrorism or ill-treatment or murder of civilians

3. Launching or waging war in a manner contrary to the laws, usages and customs of warfare

and who is hereby declared therefore to be personally answerable for the violations of international law, of the laws of humanity, and of the dictates of public conscience, Reproduced in Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London, 1945 (Washington D.C.: US Government Printing Office, 1949), p.312.

<sup>15</sup> *Trial of Shigeki Motomura and others*, 13 Law R. Trials War Crim. 138 ("Motomura case").

<sup>16</sup> *Id.* at pp.138-9.

13 of the 15 accused were convicted of systematic terrorism practiced against civilians for acts including unlawful mass arrests.<sup>17</sup> Seven of those convicted were sentenced to death and the rest to prison sentences ranging from 1 to 20 years.<sup>18</sup>

With this background, the nations that drafted the Geneva Conventions of 1949 adopted the offense of terrorism into the fourth Geneva Convention for the protection of civilian populations. Article 33 of that Convention states in part: “No protected person may be punished for an offense he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of **terrorism** are prohibited.” (Emphasis added.)<sup>19</sup>

In the 1970s, *terrorism* was included in the two additional protocols to the Geneva Conventions of 1949. Article 51(2) of Additional Protocol I, relating to international armed conflict, prohibits “[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population.” Article 4.2(d) of Additional Protocol II, relating to internal conflicts, prohibits acts of terrorism against civilians. And Article 13.2 of this same Protocol states that “[t]he civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”

More importantly, the first modern International Criminal Tribunal since the Second World War charged with addressing violations of the laws of war, the International Criminal Tribunal, Yugoslavia (ICTY), tried and convicted a former military officer of “attacking civilians with the intent of inflicting terror.” The crimes charged in this case (*Prosecutor v. Stanislav Galic*, ICTY Case No. IT-98-29-T (December 5 2003)) includes violations of Article 51 of Additional Protocol I and Article 13 of Additional Protocol II to the Geneva Conventions of 1949, under Article 3 of the Statute of the Tribunal. *Galic*’s acts of terrorism during the period of 10 September 1992 to 10 August 1994 were described as conducting “a protracted campaign of shelling and sniping upon civilian areas of Sarajevo and upon the civilian population thereby inflicting terror and mental suffering upon its civilian population.” The Accused in this case is charged with conspiracy to commit terrorism for acts that occurred from January 2001 through December 2001. The elements of the charge of terrorism under MCI No. 2 and that of Article 3 of the ICTY statute both focus on the same underlying conduct of attacking civilians with the intent to inflict terror.

Additionally, the offense of terrorism as a violation of the laws of armed conflict for the protection of civilians in an international conflict and in a non-international conflict was further codified in 1994 when the statute of International Criminal Tribunal for Rwanda (ICTR) was promulgated by the United Nations Security Council and ratified by the General Assembly of the United Nations.

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<sup>17</sup> *Id.* at p. 140.

<sup>18</sup> *Id.* at p. 140.

<sup>19</sup> Armed forces manuals also incorporated the prohibition. See, for example, United States Field Manual No. 27-10: The Law of Land Warfare (Washington D.C.: Department of the Army), para. 272 (1956); United Kingdom Manual of Military Law, Part III: The Law of War on Land (London: The War Office, HMSO), para. 42 (1958).

Article 4(d) of the ICTR statute restates the prohibition on terrorism contained in Articles 4 and 13 of the Additional Protocol II. The ICTR has the power to prosecute persons committing serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

- a) Violence to life, health and physical or mental well-being of persons, in particular **murder** as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
- b) Collective punishments;
- c) Taking of hostages;
- d) **Acts of terrorism**;
- e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
- f) Pillage;
- g) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;
- h) Threats to commit any of the foregoing acts.

*ICTR Statute*, 25 May 1993. (Emphasis added).

In addition to *terrorism* being a violation of the laws of armed conflict, it is also proclaimed as an international crime in several international conventions dating from the 1970s to the present. These conventions address various aspects of international terrorism, such as financing of terrorism, and terrorist bombing. In defining terrorism, the conventions all address the same essential elements, primarily focused on violent attacks on civilian populations. For example, the 1999 International Convention for the Suppression of Financing of Terrorism,<sup>20</sup> adopted and ratified by 117 countries, including the United States,<sup>21</sup> defines the criminal act of terrorism as an “act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.”<sup>22</sup> The above elements mirror the elements of “Terrorism” found in MCI No. 2 with the exception of the requirement of a nexus to armed conflict.

The Accused in this case has been charged with an offense that is clearly a violation of the laws of armed conflict. Acts of terrorism have been considered as an offense under the law of war as early as 1919 and codified in Article 33 of the 1949

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<sup>20</sup> International Convention for the Suppression of the Financing of Terrorism, Jan. 10, 2000

<sup>21</sup> Parties who have ratified *available at* <http://untreaty.un.org/English/Terrorism.asp>

<sup>22</sup> *Id.*

Geneva Convention IV, Article 51(2) of Additional Protocol I, Articles 4(d) and 13 of Additional Protocol II, Article 3 of ICTY in 1993 and Article 4 of ICTR statute in 1994. Therefore, contrary to Defense's assertion, Terrorism is a cognizable offense under the laws of war, conventional law and international criminal law. Accordingly, the charge of conspiracy to commit terrorism, a violation of the law of war, is triable by a military commission.

b. Individuals Subject to Trial by Military Commission Can be Charged with Terrorism as a Violation of United States Domestic Law.

Military commissions have been part of the system of laws of the United States since the founding of our country and are the appropriate forum for the prosecution of unlawful combatants for violations of the laws of war and other offenses. The use of military commissions has been consistently approved by the United States Supreme Court and confirmed by Congress. Nothing in the legislative or judicial history of military commissions defines or limits which statutory offenses may be charged at the present Military Commissions.

As the Supreme Court of the United States stated, “[a] military commission is our common-law war court. It has no statutory existence, though it is recognized by statute law.” Thus, “[i]t has been adapted in each instance to the need that called it forth.” *Madsen v. Kinsella*, 343 U.S. 341, 346-7 (1952). (Emphasis added). In discussing the inclusion of the President’s authority to create military commissions as part of the Articles of War, the Court stated “[i]f Congress intended to *depart* from that longstanding practice by subjecting the commissions to a rigid and uniform set of procedures—tying the President’s hands during times of war in the process—it surely would have done so more plainly. *See id.* at 346 n.9. (“The commission is simply an instrumentality for the more efficient execution of the war power vested in the President as Commander-in-chief in war.” *Id.*)

The relevant provisions of the Articles of War were restated, without change in the Uniform Code of Military Justice (found in Title 10 of the U.S. Code). Section 821 of that Code states, in relevant part, that “...**offenses that by statute or by the law of war may be tried by military commissions.**”

Pursuant to his authority, the President ordered the establishment of military commissions to try detainees for violations of the laws of war and other applicable laws. In doing so, the President expressly relied on “the authority vested in [him] . . . as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the [AUMF] and Sections 821 and 836 of Title 10, United States Code.” Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001) (hereinafter “Military Order”).

On 13 November 2001, the President ordered the Secretary of Defense “[to] take all necessary measures to ensure that any individual subject to this order is detained ...



and tried in accordance with section 4” of the order.<sup>23</sup> Pursuant to the President’s order, the Secretary of Defense issued MCO No. 1, which is consistent with the President’s Military Order, establishing jurisdiction over violations of the law of war and all other offenses triable by military commissions.

In accordance with the President’s order, Secretary of Defense directed the General Counsel of the Department of Defense to issue instructions consistent with the PMO and the MCO No. 1. Accordingly, the General Counsel issued crimes and elements which states, in relevant part, that:

The following crimes and elements thereof are intended for use by military commissions established pursuant to [MCO No. 1] and [PMO], the jurisdiction of which **extends to offenses or offenders that by statute or the law of armed conflict** may be tried by military commission as limited by the [PMO].

MCO No. 2 3(A) (Emphasis added.)

At a minimum, the provisions of U.S. law that would be triable by military commissions would include those sections that have been promulgated as part of U.S. obligations under international conventions and that have extra-territorial application. Such offenses would include those sections of Title 18 of the U.S. Code that reflect the U.S ratification of terrorism conventions or otherwise address international acts of terrorism, including: 18 U.S.C. §2332 (Homicide); 18 U.S.C. §2332a (Use of certain weapons of mass destruction); 18 U.S.C. §2332b (Acts of terrorism transcending national boundaries); 18 U.S.C. §2332f (Bombing of public use, government facilities, public transportation systems and infrastructures); 18 U.S.C. §2339 (Harboring or concealing terrorists); 18 U.S.C. §2339A (Providing material support to terrorists); 18 U.S.C. §2339B (Providing material support or resources to designated foreign terrorist organizations); and U.S.C. §2339C (“Prohibitions against the financing of terrorism”). All of these offenses have extraterritorial application. Further, they share the basic elements definition of terrorism contained in the international conventions – an act intended to cause death or serious bodily injury to a civilian, where the purpose is to intimidate a population, or to compel a government or an international organization to do or assistance abstain from doing any act or to otherwise support or assist those who commit terrorist acts.

The elements in the above-listed offenses also mirror the elements of **Terrorism** under MCI No. 2. In addition, the acts contained in the U.S. statutes were also recognized as criminal offenses under international law at the time the Accused allegedly

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<sup>23</sup> 66 Fed. Reg. 222 (November 16, 2001), Section 4(a) states:

Any individual subject to this order shall, be tried by military commission **for any and all offenses triable by military commission** that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death.

committed his crimes. Accordingly, in addition to violations of the laws of war, the Accused may be charged with certain violations of the United States Criminal Code.

6. Attached Files. None.

7. Oral Argument. If the Defense is granted oral argument, the Prosecution requests the opportunity to respond.

8. Witnesses/Evidence. As the Defense's Motion is purely a legal one, no witnesses or evidence are required.

//Original Signed//

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Lieutenant Colonel, U.S. Marine Corps  
Prosecutor